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Supreme Court of the United States

OCTOBER TERM, 1934

No. 552

THE YOUNGSTOWN SHEET AND TUBE COMPANY, REPUBLIC STEEL CORPORATION, SHARON STEEL HOOP COMPANY, *et al.*,

Appellants,

vs.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, THE BALTIMORE AND OHIO RAILROAD COMPANY, *et al.*

REPLY BRIEF FOR APPELLANTS

FREDERICK H. WOOD,
J. C. ARGETSINGER,
J. E. BENNETT,
AUGUST G. GUTHEIM,
LITTLETON GROOM,
Counsel for Appellants.

April, 1935.

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REPLY BRIEF FOR APPELLANTS

In their answering brief the Government and the Commission contend:

1. That the appellants, being consumers and shippers, may not in their own right maintain this suit.

2. That the appeal presents moot issues, since a judgment in appellants' favor would be futile in that it would not operate to require the railroads to restore the former rates or to establish any other rates.

3. That the Commission's order is in all respects a valid order, fully supported by the evidence and by the findings of the Commission.

I

THE APPELLANTS HAVE STANDING IN THEIR OWN RIGHT TO MAINTAIN THIS SUIT.

Apparently it is the position of the Government and the Commission that, since the carriers have not attacked the order of the Commission, but have intervened in support thereof, the appellants may not maintain a suit to enjoin the enforcement of and to set aside the order. Reliance in support of that position is placed chiefly upon the decision of this Court in *A. Sprunt & Sons Inc. et al.* v. *United States*, 281 U. S. 249, and an attempt is made to fit the case at bar into and to limit it by the confines of that case. This case and the *Sprunt* case, as will presently be demonstrated, are entirely unlike.

The lack of merit in the position of the Government and the Commission is readily apparent. Carried to its ultimate and logical end, a shipper or consumer could never obtain redress at the hands of a court, this Court included, in any case in which the carriers are content to abide by the Commission's order. In other words, if the position of the Commission and the Government is sound, there is nothing to prevent the Commission from arbitrarily prescribing rates or practices and having its orders free from attack by shippers. For example, the Commission could, if its present contention is sound, arbitrarily establish a rate of $5 per ton or $10 per ton on coal from Conway and Colona to Youngstown or any rate, high or low, and its order be safe from

attack, if the carriers should see fit to abide thereby. Obviously, this Court would not in such a case deny affected shippers the right to maintain a suit to set aside the order. The conception is wholly contrary to our system of jurisprudence. Yet, that is, as stated, the logical conclusion to be drawn from the contention of the Government and the Commission in respect of the right of shippers to maintain an action to set aside its orders.

The *Sprunt* case does not support the Commission's position. In that case the order of the Commission required certain railroads to remove undue prejudice and preference as between shippers using facilities at or near the waterfront at certain Texas ports on the one hand, and shippers located elsewhere on the other. At the argument before the Supreme Court, the Court itself raised the preliminary question whether under the circumstances involved the shippers acting alone had any substantive ground for appeal. The issue before the Commission was essentially whether or not undue prejudice and undue preference in violation of Section 3 existed in the rates and practices in question. The Court was of the opinion that the shippers, who were the appellants before it, had no standing in their own right to attack the Commission's order, they having no independent right which was violated by the order. A reading of the Court's opinion reveals that no independent right existed in Sprunt & Sons because the advantage which they enjoyed under the former tariff "was merely an incident of, and hence was dependent upon, the right, if any, of the carriers to maintain that tariff in force and their continuing desire so to do". Since the tariff in question was unduly preferential on the one hand and unduly prejudicial on the other, the carriers had no right to maintain it in force. The appellants, therefore, could not complain of the order

requiring the carriers to cancel the illegal tariff and to remove the undue preference and undue prejudice, although the result thereof was to deprive them of their former economic advantage.

In the case at bar the appellants' right not to be required to pay in excess of a reasonable maximum rate, measured by the standards of the Interstate Commerce Act, is not an incident of any right, or supposed right, of the carriers. It is a right given by the Statute and is independent of any right in the carriers to initiate rates. Moreover, it is the statutory duty of the carriers to furnish reasonable services and to charge therefor no more than reasonable maximum rates, measured by the standards of the Interstate Commerce Act. The duty of the carriers in respect of charging no more than reasonable maximum rates is correlative with the right of shippers not to be required to pay more than reasonable maximum rates. The existence of the independent statutory right of the appellants herein, as distinguished from the incidental right of the appellants in the *Sprunt* case, suffices to distinguish the instant case from the *Sprunt* case. For similar reasons the instant case is unlike the cases of *Edward Hines Yellow Pine Trustees* v. *United States*, 263 U. S. 143, and *United States* v. *Merchants etc. Ass'n.*, 242 U. S. 178. The case of *Moffat Tunnel League* v. *United States*, 289 U. S. 113, cited in the brief of the Government and the Commission, is clearly not in point. There, not only did the appellants have no legal interest, their interest being no more than a sentiment, but they lacked the capacity to sue, being, in contemplation of law, not legal persons.

The right of the appellants is not unlike that of the appellants in *Skinner & Eddy Corporation* v. *United States*, 249 U. S. 557. There, the right, under the last paragraph of Section 4 of the Interstate Commerce Act, not to pay in-

creased rates, except when due to reasons other than the elimination of water competition, was clearly the right of the shipper, and it was so held by this Court (see also reference to the *Skinner* case in footnote 5 to the *Sprunt* case). Here, to paraphrase the language of Mr. Justice Brandeis in the footnote referred to, the right of the appellants under the Act not to pay increased rates, except when due to reasons authorized by the Interstate Commerce Act, is clearly the right of the shipper. The appellants herein, shippers and consumers of coal, maintain that the Commission in prescribing the 90c rate departed from the standards and requirements of the Interstate Commerce Act and that, therefore, their right not to be required to pay more than reasonable maximum rates measured by the standards of the Act has been infringed.

The right of the appellants herein is, likewise, not unlike the right of the shipper in *Interstate Commerce Commission* v. *Diffenbaugh*, 222 U. S. 42, who sought to recover allowances for substituted transportation facilities alleged to be due under Section 15 of the Act. The right to such payment was provided for in the Act. Similarly, the right of the shippers herein, not to be required to pay more than reasonable maximum rates, when measured by the standards of the Act, is provided for in the Act. Again the right of the appellants herein is not unlike the right of the appellants in the *Chicago Junction* case, 264 U. S. 258. Here, as there, the appellants were parties to the proceedings before the Commission. Here, as there, the appellants, if the order of the Commission be sustained, will suffer loss in their revenues. In the *Chicago Junction* case, it will be remembered, this Court, referring to its decision in *Interstate Commerce Commission* v. *Chicago, Rock Island & Pacific Railway Co.*, 218 U. S. 88, 109,

stated that if, as suggested there, "a legal interest exists where carriers' revenues may be affected, there is clearly such an interest here." The loss to the carriers in their revenues in that case was occasioned by the loss of traffic to the New York Central which was permitted by the Commission's order to acquire the terminal railroads in question. Here, the loss in revenues to the appellants, if the order of the Commission be sustained, will be occasioned by the fact that the order requires them to pay rates in excess of reasonable maximum rates, when measured by the standards of the Interstate Commerce Act.

In other cases it has been assumed, without discussion, that shippers may prosecute proceedings to determine the validity of orders of the Commission. *Assigned Car Cases*, 274 U. S. 564; *Western Chemical Company* v. *United States*, 271 U. S. 268; *United States* v. *New River Co.*, 265 U. S. 533; *Nashville etc. Railway* v. *Tennessee*, 262 U. S. 318. Compare *Anchor Coal Co.* v. *United States* (*Lake Cargo Coal Rate* case), 25 Fed. (2d) 462, 478-479. There, the contention that shippers could not maintain an action to set aside the order of the Commission was overruled by the District Court. On appeal to this Court the same contention was made by the northern carriers and the northern coal operators. This Court, however, after full argument and full consideration, decided that the issues had become moot.

It is stated in the brief of the Government and the Commission that the District Court reached no decision in respect of the standing of the appellants to maintain a suit to set aside the Commission's order; and that the Court assumed without "deciding that the appellants could maintain the suit". It is true that the Court assumed without deciding that appellants could maintain the suit. The views

of the Court in respect of appellants' right to maintain the suit are, however, of record. In its opinion (Record 131, 132) the District Court stated:

> "Principal reliance is placed upon the *Sprunt* case, thoroughly analyzed and argued in each of the briefs. In that case the Sprunts had an economic advantage over competitors destroyed by a reduction of rate applicable to such competitors on delivery of cotton to shipside. It was held that while the enjoyment of this advantage gave the Sprunts a distinct interest in the proceeding before the Commission under Section 3 of the Interstate Commerce Act, and having this interest they were entitled to intervene in the administrative proceeding initiated by the carriers, that the carriers having acquiesced in the orders of the Commission, the Sprunts had no longer an independent right to suit to assail the Commission's order. As shippers they were entitled only to reasonable service at reasonable rates without unjust discrimination, and if such service and rates were accorded, they could not complain of the retraction of a competitive advantage to which they were not otherwise entitled. *The situation of the shippers and consignees in these cases is not that of the Sprunts. If the order of the Commission is sustained they will be obliged to pay an additional freight charge of 13c a ton on all coal they buy or sell that is shipped ex-river. They claim the proposed minimum rate to be unreasonable, and any doubt that may have existed as to the allegations of the bill being sufficient to raise the question of reasonableness is now resolved by the amendments made to the pleadings at the hearing.* The common law rights of the plaintiffs to reasonable maximum rates are claimed to be preserved by Section 22 (1) of the Interstate Commerce Act, which provides 'Nothing in that act con-

> tained shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this Act are in addition to such remedies.' *It would seem that the situation here with respect to the shippers and consignees is clearly* [*fol. 148*] *distinguishable both on facts and principle from the situation of the plaintiffs in the Sprunt case, and that the other cases by Judge Parker in his careful opinion in Anchor Coal Company* v. *United States, 25 Fed. (2d) 462 (C. C. A. 4), decided, however, before the opinion in the Sprunt case was announced. Noting this important, and perhaps controlling distinction in the situation of these plaintiffs,* we are content to assume without deciding, since in view of our subsequent conclusions decision is not imperative, that the plaintiffs have a justiciable grievance which can be here litigated." (Emphasis added.)

There can be no doubt from this statement of the District Court of its real views in respect of the right of the appellants to maintain the present suit.

The Government and the Commission in their briefs contend—it is to be noted that the language is that of the *Sprunt* case—that "legally appellants' position was no different than it would have been if the carriers had filed the rates without an order". Assuming this to be true, it does not help the Government or the Commission. If the carriers had proposed a 90c minimum rate and the Commission, pursuant to Section 15(7), upon the complaint of the appellants or upon it own initiative had, after a hearing, found the 90c rate to be a reasonable minimum rate, it may not be said that the shippers in that event would have been remediless, they claiming that the order of the Commission was entered pursuant to a misconception of its powers. Nor may it be said that, in that event, their only remedy

would be a further proceeding before the Commission. In the *Sprunt* case the question as to the reasonableness of the level of the rate was expressly left open by the Commission. It did not prescribe any rate as the minimum. In other words, the Commission's action in respect thereof was not final or intended so to be. Here, however, there is no question as to finality of the Commission's action. The 90c rate was prescribed by the Commission as a reasonable *minimum* rate. Here, it cannot be said, as was said by this Court in the *Sprunt* case, that, "if appellants are agrieved by the level of the new rates, they still have their remedy before the Commission under Sections 13 and 15 of the Act". Appellants have been before the Commission on five separate occasions in connection with the prescribing of a reasonable rate for the moving of ex-river coal to Youngstown. It is unnecessary to repeat the history of those proceedings. It suffices to say that further resort to the Commission is no remedy whatever. On the contrary, it would be a denial of remedy, for by the denial and dismissal of a petition complaining of the reasonableness of the 90c rate, appellants would be foreclosed. They could not, under the negative order principle enunciated in *Procter & Gamble* v. *United States*, 225 U. S. 282, challenge the Commission's order.

II

THE ISSUES IN THE APPEAL HEREIN ARE NOT MOOT.

(a) The termination of the appeal herein will automatically effect a restoration of the 90c rate which was prescribed as a reasonable maximum rate.

Relying upon and citing the *Sprunt* case, the Government and the Commission contend that the issues presented

by the appeal are moot, since a judgment in appellants' favor would be futile, in that it would not operate to require the restoration of the former 77c rate or the establishment of any other rate.

In the *Sprunt* case it was held that, by the action of the carriers the issue of undue prejudice and undue preference, which had been passed upon by the Commission, had become moot; that a judgment in favor of the appellants would be futile since it would not restore them to the advantage previously enjoyed; and that, if the Commission's order were set aside, the carriers would still be free to equalize the rates. In the instant case, however, that situation does not exist, the Commission's contention to the contrary notwithstanding. If the Commission's order be set aside, the rate will automatically revert to the 77c rate prescribed by the Commission as a reasonable maximum rate in the First Ex-River case and put into effect by the carriers pursuant to the publication of their tariffs in July and October, 1932, respectively. Any higher rate would be illegal. Any lower rate would not be established by the carriers.

Such restored rate would remain in effect until shown to be unreasonable, when measured by the standards of the Interstate Commerce Act. The setting aside of the Commission's order, therefore, would not, as in the *Sprunt* case, be futile, and the issues herein are not moot by reason of the determination thereof being a nullity.

That the carriers would be free, after the restoration of the 77c rate, to propose a change in that rate does not in the least affect the validity of the foregoing proposition. The 77c rate would have been reestablished as a result of the determination of this appeal. Moreover, the determination of the issues herein would serve as a guide to the Com-

mission when again called upon to act in the matter. The case comes squarely within *Boise City Irrigation & Land Co.* v. *Clark,* 131 Fed. 415, 419 cited with approval in *Southern Pacific Terminal Co.* v. *Interstate Commerce Commission,* 219 U. S. 499, where this Court, quoting therefrom, said in part (p. 516):

> "But the courts have entertained and decided such cases heretofore, partly because the rate, once fixed, continues in force until changed as provided by law, and partly because of the necessity or propriety of deciding some question of law presented which might serve to guide the municipal body when again called upon to act in the matter."

(b) The issues are not moot because interests of a public character are asserted by the Commission under conditions that will be repeated.

This is clearly a case where interests of a public character are asserted by the Commission. The Commission claims the power in the performance of its duty under Sections 1(5), 15(1) and 15a(2) to require an increase in rates, because (1) the existing rates, without more, are claimed by it to threaten the all-rail structure and unduly impair the revenues of the carriers, and (2) it desires to retain for the carriers by rail the haul on coal from mines in western Pennsylvania and northern West Virginia to destinations in northeastern Ohio. If this power exists at all, it is a continuing power to see that the existing rate structure shall not be changed and that the movement of coal shall not be diverted from the rails by new rates, either increases or reductions. The Commission has repeatedly exercised what it regards as its lawful power in the per-

formance of this continuing duty. Obviously, it will have occasion to do so again on more or less frequent occasions. The public interest requires the determination of the validity of the power, here exercised, even if the particular occasion which prompted its exercise in this instance has past, which is denied. That being so, the appeal is not moot and the Court will not dismiss it on that ground. It was so held in *Southern Pacific Terminal Company* v. *Interstate Commerce Commission, supra.*

In the course of its opinion in the *Southern Pacific Terminal* case, the Court pointed out at length the similarity between that case and *United States* v. *Trans-Missouri Freight Association,* 166 U. S. 290, saying in part (p. 516):

> "The interests there passed upon are no more of a public character than those involved in the order of the Interstate Commerce Commission in the case at bar, and there was no greater necessity for continuing a jurisdiction which had properly attached, than that the government is the respondent, not complainant, does not lessen or add to the character of the interests involved in the controversy or terminate its questions."

The syllabus to the *Southern Pacific Terminal Co.* case reads as follows (p. 498):

> "The case is not moot where interests of a public character are asserted by the Government under conditions that may be immediately repeated, merely because the particular order involved has expired. *United States* v. *Trans-Missouri Freight Assn.*, 166 U. S. 290, 308."

In *McGrain* v. *Daugherty*, 273 U. S. 135, the Court quoted from the *Southern Pacific Terminal* case with approval (p. 182):

> "The situation is measurably like that in *Southern Pacific Terminal Company* v. *Interstate Commerce Commission*, 219 U. S. 498, 514-516, where it was held that a suit to enjoin the enforcement of an order of the Interstate Commerce Commission did not become moot through the expiration of the order where it was capable of repetition by the Commission and was a matter of public interest."

III

THE FINDING OF THE COMMISSION IN THE FIRST EX-RIVER CASE THAT A REASONABLE MAXIMUM RATE FOR THE TRANSPORTATION OF EX-RIVER COAL FROM CONWAY AND COLONA TO YOUNGSTOWN WOULD BE 77c WAS FOR ALL PURPOSES AND EFFECT AN ORDER PRESCRIBING SUCH RATE.

The Government and Commission in their brief lay stress upon the fact that the order of the Commission in the First Ex-River case merely required the cancelation of the suspended schedule and discontinued the proceeding and did not, in so many words, require the establishment of the 77c rate as a reasonable maximum rate. The purpose of the several references in the brief to the nature of the order does not appear. However, whatever the purpose, it does not alter the fact that the finding of the Commission that 77c was a reasonable maximum rate for the services rendered in the transportation of ex-river coal to Youngstown, in effect, constitutes an order prescribing that rate. The carriers so considered it when they established their ex-river rates in 1932. Similarly, the Commission so con-

sidered it in the Second Ex-River case when it used the 77c rate as a basis for its findings in respect of reasonable rates from river points on the Wheeling and Lake Erie Railroad to destinations in northeastern Ohio.

The finding of the Commission in the First Ex-River case is as follows (R. 84):

> "We find that the suspended schedules have not been justified. This finding is without prejudice to the filing of new schedules in conformity with the views expressed herein. An order will be entered requiring the cancellation of the suspended schedules and discontinuing this proceeding."

The Commission thereupon entered its order (R. 84-85) requiring the cancelation of the schedules. In the order, according to the usual custom of the Commission, the report and findings were referred to and made a part of the order. Moreover, there is no fundamental difference between the form of the finding and order in the First Ex-River case and the form of findings and orders entered in hundreds of Investigation and Suspension Proceedings under Section 15 (7).

IV

APPELLEES HAVE COMPLETELY FAILED TO MEET THE POINT THAT THE COMMISSION, IN MAKING ITS ORDER, DEPARTED FROM THE STANDARD OF THE INTERSTATE COMMERCE ACT, PROCEEDED UPON A MISCONCEPTION OF ITS POWERS AND DUTIES, AND EXCEEDED ITS AUTHORITY.

The "Argument on the Merits" set forth in the Government's and Commission's brief consists largely of ex-

tracts from the Commission's report and order. Appellees have completely failed to meet the point that the Commission departed from the standards of the Interstate Commerce Act, proceeded upon a misconception of its powers and duties and exceeded its authority (a) under its minimum rate making power, Section 15 (1); (b) under its rate making power under Section 15a(2); (c) under its regulatory power under Section 1 (5); (d) under Section 500 of the Transportation Act; or (e) under any other section of the Interstate Commerce Act, as amended. No attempt is made to meet the point that the Commission exceeded its powers in prescribing 90c as a minimum rate unaccompanied by any finding that the existing rate was not compensatory, or was so low as to cast an undue burden upon other traffic. Nor is any attempt made to meet the point that the Commission was without authority to use its minimum rate making power for the mere purpose of preventing the disturbance of an existing rate structure. It is true that an attempt is made to distinguish the *Milwaukee* case from the instant case. How successful is the attempt is for this Court to determine. Our views in respect of the *Milwaukee* case and its application hereto are fully set forth in our opening brief. It is likewise true that an attempt is made to show that the 77c rate was unreasonably low and therefore constituted a menace to the existing rate structure. But it is to be noted that no attempt is made to show that the 77c rate, measured by the usual and customary standards of the Interstate Commerce Act, was unreasonably low. All that is said in the brief is that, measured by certain rate comparisons, the 77c rate was found to be too low. For the same reason, namely, the 77 cent rate was found to be too low, it is said that the

rate was found to be unduly prejudicial against inland mines and unduly preferential of river mines.

In our opening brief we attempted to show, and did show, that the rate comparisons referred to by the Commission if intended by it as affording a basis for any definite finding in the report are insufficient, as is the whole state of the record in respect of rate comparisons, to support a finding either (a) that the 77c would cause a disruption of the rate structure in central territory or (b) that the 77c rate is unreasonably low.

No attempt is made to explain the absence of evidence or finding respecting the effect of the 77c rate upon the revenues of the Pittsburgh & Lake Erie and the Pennsylvania. True, the Commission's recitals and general findings are referred to and some reference is made to the testimony of Witness Kern that, based on 1929 and 1931 tonnages in Central Territory, a reduction of 1c per ton on coal would result in a loss of revenue to the railroads in that territory of $1,500,000 per annum. Nevertheless, as pointed out in our opening brief, the effect of the 77c rate upon the *net* revenues of the carriers affected, was not touched upon either in the Commission's report or by the carriers in their testimony. The effect upon net revenues of a rate yielding $5,000 per train and approximately $120 per train mile is clearly entitled to some consideration. The Commission gave none to it in its report and it gives none to it in its brief. The reason is obvious. The 77c rate was highly compensatory and its effect on the net revenues of the carriers was far from disastrous.

It is quite apparent from the brief of the Government and the Commission that the Commission's order, if it is to be sustained, must be sustained by this Court's determining that the appellants are without right to maintain this

suit to set aside the order, or that a determination of the appeal herein will be futile. As herein before shown, neither proposition is sound.

Respectfully submitted,

FREDERICK H. WOOD,
J. C. ARGETSINGER,
J. E. BENNETT,
AUGUST G. GUTHEIM,
LITTLETON GROOM,
Counsel for Appellants.

April, 1935